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IN THE
Supreme Court of the United States
OCTOBER TERM, 1968

No. 138

ADAM CLAYTON POWELL, JR., ET AL.,
Petitioners,

v.

JOHN W. MCCORMACK, ET AL.,
Respondents.

**MOTION FOR LEAVE TO FILE AND BRIEF OF
GEORGE MEADER, AMICUS CURIAE,
IN SUPPORT OF RESPONDENTS**

GEORGE MEADER
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Washington, D. C. 20015

February 4, 1969

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MAY IT PLEASE THE COURT:

The undersigned, George Meader, respectfully moves this honorable court for leave to file the annexed brief *amicus curiae* in this case in support of Respondents.

1. Applicant served as a member of the U. S. House of Representatives from the Second Congressional District of Michigan between 1951 and 1965, and in the Eighty-third and 86th-88th Congresses was a member of the Judiciary Committee of the House of Representatives. Prior to such Congressional service, applicant served for approximately four years, commencing in July of 1943, as Assistant Counsel and then Chief Counsel of the United States Senate Spe-

cial Committee Investigating the National Defense Program, popularly known as the Truman Committee. In 1950, Applicant served as Chief Counsel of the United States Senate Banking and Currency Subcommittee Investigating RFC Loans, popularly known as the Fulbright Committee. Subsequent to congressional service, Applicant served as Associate Counsel and then Chief Counsel of the Joint Committee on the Organization of the Congress between March of 1965 and August of 1968. Among the subjects committed to the Joint Committee on the Organization of Congress for study was relations between the judicial and legislative branches of the government. Applicant has followed with great interest the developments in this case from its beginning to the present time.

2. Applicant believes there are necessarily involved in this case certain historic but delicate constitutional issues which the Court should consider. These issues are:

- a. Is this an appropriate class action?
- b. May 434 members of the House of Representatives be bound when only 6 members have been served?
- c. Is this attempted class action in effect a suit against the House of Representatives as a legislative body?
- d. Is the House of Representatives a "person" or "party" that may be brought before the Court as a defendant in a suit?
- e. If the House of Representatives is a person which can be made a party, is it clothed with the sovereign immunity of the United States Government?
- f. If it is so clothed, has that sovereign immunity ever been effectively waived?
- g. Whether the suit is treated as one against the House of Representatives as a legislative body or as against all of its members as individuals, does the Court have any effective sanction for enforcing its decree in the light of the "freedom from arrest" clause of the Constitution?

3. Applicant believes the foregoing issues will not be adequately presented by the parties in this case because these issues were not adequately presented in the briefs before the United States Court of Appeals. Furthermore, Petitioners' brief in this Court does not adequately present these issues.

4. Even though Respondents may prevail on some other grounds, failure of the Court to comment on the issues raised above may be a precedent that the House of Representatives can be sued by a citizen, or citizens, through the device of a class suit. At the minimum, in the event the Court does uphold Judge Hart's dismissal of the above action, on grounds other than those enumerated above, the Court could appropriately include in its opinion a statement to the effect that, having disposed of the case on other grounds, the Court did not find it necessary to consider and reach a decision on the issues raised above.

5. Applicant has requested consent to file a brief *amicus curiae* from the parties to this case under Rule 42 of the Rules of this Court, but has not yet received from either party the written consent requested.

6. It is respectfully submitted that this case affords an appropriate occasion for the Court to grant leave to file the brief annexed hereto.

I therefore urge that leave be granted, and respectfully so move the Court.

Respectfully submitted,

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FACTS

Petitioners commenced this action in the United States District Court for the District of Columbia under Rule 23a of the Rules of Civil Procedure against the Speaker and five other members of the House of Representatives of the 90th Congress, individually, and "as representatives of a class of citizens who are presently serving in the 90th Congress as members of the House of Representatives," and also against three officers of the House of Representatives.

The Petitioners sought a temporary and permanent injunction restraining Respondents from enforcing and operating under House Resolution 278, Adopted March 1, 1967,

excluding Representative-elect Adam Clayton Powell from the 90th Congress.

Attorney Bruce Bromley, after appearing specially on behalf of Respondents, moved to dismiss the action on the grounds that the Court did not have jurisdiction over the persons or the subject matter of the suit.

District Judge Hart dismissed the suit "for want of jurisdiction of the subject matter," basing his decision on the doctrine of separation of powers between the judicial and legislative branches of the government.

The Circuit Court of Appeals for the District of Columbia affirmed Judge Hart's order dismissing the suit but in their opinions held that they did have jurisdiction over the defendants and the cause was justiciable but in their discretion they decided it was inappropriate to exercise their jurisdiction.

QUESTION

May Petitioners, either individually, or as representatives of a class, maintain an action in a United States District Court against Respondents, either as individuals in their legislative capacity or as representatives of a class consisting of all members of the House of Representatives of the 90th Congress, or against the U. S. House of Representatives itself as a legislative body?

ARGUMENT

Introduction

Although the undersigned has views on the decision of the House of Representatives in House Resolution 278, and on the power of the House of Representatives to judge the qualifications of its members; and the extent of that power, and other issues such as justiciability, the extent of federal court jurisdiction over cases arising under the laws or Constitution of the United States, the speech and debate clause and immunity rising therefrom, and the political-question issue; none of these matters will be discussed in

Applicant's brief because the Applicant desires to focus attention upon the propriety of the procedure in this suit, namely, whether or not the device of a class action under Rule 23 of the Rules of Civil Procedure is available for a citizen to commence an action against the House of Representatives of the United States Congress.

I

This Is Not An Appropriate Class Action.

In determining whether all members of the House of Representatives of the 90th Congress are a "class," so that they may be effectively joined as defendants through the service of process on six members as representatives of that class, the following considerations are relevant:

1. Each individual member is the representative of his own constituency and no two constituencies are the same.
2. Each member must cast his own vote and may not transfer the right to his vote to any other member or person.
3. A seat in Congress, unlike a share of stock, cannot be sold or transferred.
4. To bind member A, who was not served or represented in the instant case, by a decree against member B, who was served and appeared by counsel, would deny due process to A and to the constituents he represents.
5. It is the very essence of a legislative body to hold and advance differing points of view. Indeed, the debate on H. Res. 278 (March 1, 1967), as well as the debate on H. Res. 376 (March 9, 1967) authorizing the Speaker to employ counsel, are evidence of widely differing views of members—not only on the seating of Powell—but even on the manner in which the suit against some members and officers of the House should be defended.
6. Some members of the House of Representatives are Republicans, other are Democrats, some voted in favor of Powell at various stages in the proceedings of March 1, 1967, other voted against him.

7. It is difficult to see how any small group of members such as the six served in the *Powell* case can appropriately "represent" other members who were not served. It is difficult to conceive, for instance, that Representative Celler, who is a named defendant, could represent Representative H. R. Gross of Iowa.

8. 428 elected members of the House of Representatives are not "too numerous" to be brought before the Court as defendants when the purpose of the action is to bind them individually in the exercise of their legislative discretion.

9. Under Rule 23c of the Rules of Federal Civil Procedure, defendants sought to be joined as a class, but not served with process, are entitled to notice, and have the option of being excluded or entering an appearance through their own counsel. The pertinent provisions are as follows:

"(c) DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED: NOTICE: JUDGMENT: ACTIONS CONDUCTED PARTIALLY AS CLASS ACTIONS.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel. . . ."

10. Even if all 434 members, individually, could be joined as defendants in a class action, as individuals, this still would not reach the result requested by Petitioners. Even if each of the 434 members should individually, or with co-sponsorship in groups of twenty-five, introduce resolutions in accordance with the requests of Petitioners, still no action would occur officially by the House of Representatives until all of the procedures under the Rules and precedents of the House had been undertaken to validly adopt a resolution of the House of Representatives. The only meaningful relief the Court could grant would be against the House of Representatives as a legislative body, not against its entire membership as individual representatives.

II

The House of Representatives Is Not A "Person" Capable of Being Made A Party Defendant In A Suit In The U. S. District Court.

A. The House of Representatives is not a "person," natural or artificial. It owes whatever corporate existence it has to the Constitution of the United States, which defines its organization and its powers.

The House of Representatives is one branch of the Congress of the United States and has only the attributes described in the Constitution. Nowhere in the Constitution is the Congress as a whole, or the Senate or the House of Representatives as its branches, given the power to sue or be sued.

Whether the Congress through the exercise of its legislative power could vest in itself or in either or both of its branches the power to sue or be sued would be, for the purposes of this action, idle speculation, because the Congress has never passed such a law.

In the history of our republic, this is the first case ever to reach the Supreme Court in which plaintiffs have sought to make the House of Representatives or the Sen-

ate or the Congress as a whole a party defendant in the federal courts. This historical fact is persuasive in itself that the House of Representatives as a legislative body may not be brought before the federal courts.

B. Even if the House of Representatives is a "person" with the capacity to be made a party defendant in an action, it is clothed with the sovereign immunity of the United States Government which would successfully prevent maintaining an action against it without its consent. Petitioners can cite no law waiving this sovereign immunity of the House of Representatives nor action by the House of Representatives, itself, consenting to be sued.

III

Whether the Suit Is Treated as One Against the House of Representatives as A Legislative Body or as Against All of Its Members as Individuals, the Courts Do Not Have Any Effective Sanction for Enforcing A Decree In the Light of the "Freedom From Arrest" Clause of the Constitution.

ARTICLE I, Sec. 6, Clause 2, of the United States Constitution provides as follows with respect to Senators and Representatives:

"They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same;"

A decree granting the affirmative relief prayed by Petitioners would be enforceable through contempt proceedings and imprisonment of Respondents. Such enforcement sanction against respondents would be unavailable by reason of the "freedom from arrest" clause quoted above.

If the "freedom from arrest" clause is not a bar to imprisonment for contempt, the legislative process would come to a halt.

CONCLUSION

It is respectfully suggested that the judgment of the Court of Appeals should be vacated and the case remanded to the District Court with directions to dismiss the complaint on the grounds that it does not present an appropriate class action under Rule 23 of the Civil Rules of Procedure; that the House of Representatives as a legislative body may not be made a party defendant in a suit in the United States District Court and that the Court is without power to enter an enforceable decree because of the "freedom from arrest" clause of the United States Constitution.

In the event the relief suggested above is granted by the Court, but on other grounds, it is respectfully suggested that the Court include in its opinion a statement to the effect that because of its disposition of the case on other grounds, the Court did not find it necessary to reach and pass upon the issues raised in this brief.

Respectfully submitted,

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